U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-A-, INC.

DATE: DEC. 7, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an IT services company, seeks to employ the beneficiary as a project manager under the immigrant classification of advanced degree professional. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner filed the instant Form I-140, Immigrant Petition for Alien Worker, on March 3, 2015. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the U.S. Department of Labor (DOL) on August 26, 2014, and certified by the DOL (labor certification) on January 22, 2015. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date.[1] See 8 C.F.R. § 204.5(l)(3)(ii)(B) and *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the instant petition is August 26, 2014.

For the job at issue in this proceeding – project manager – the Petitioner specified in Part H of the ETA Form 9089 the following education, training, and experience requirements:

4.	Education: Minimum level required:	Bachelor's degree
4-B.	Major Field of Study:	Engineering (any), Information Technology, Computer Information Systems
5.	Is training required in the job opportunity?	No
6.	Is experience in the job offered required?	Yes
6A.	Number of months experience required:	60 months

[1] The priority date of an immigrant petition is the date the underlying labor certification application was accepted for processing by the DOL *See* 8 C.F.R. § 204.5(d).

7. Is there an alternate field of study that is acceptable? Yes

7-A. Alternate field of study: Computer Technology, Management Information Systems, Business Administration

8. Is there an alternate combination of education and experience that is acceptable? No

9. Is a foreign educational equivalent acceptable? Yes

10. Is experience in an alternate occupation acceptable? Yes

10-A. Number of months experience in alternate occupation required. 60 months

10-B. Job title of the acceptable alternate occupation: Consultant, Engineer, or related field

As evidence of the Beneficiary's educational credentials the Petitioner submitted copies of the following pertinent documentation with the Form I-140 petition and its response to the Director's request for evidence:

- A certificate from [redacted] in [redacted] India, issued on March 30, 1993, stating that the Beneficiary had been elected as an Associate Member by virtue of having passed the Institution's [redacted] Examination in December 1992;
- An [redacted] Examination Marks Card issued by the [redacted] on May 21, 1993, listing the Beneficiary's 16 courses and recording his marks in 12 examinations taken between June 1989 and December 1992;
- A letter from the Hon. Secretary of the [redacted] dated March 19, 2015, stating that the Beneficiary was a student at the [redacted] India, for four years and four months between February 8, 1988 and June 1992;
- An Academic Equivalency Evaluation from [redacted] dated February 27, 2013, asserting that the Beneficiary's coursework at the [redacted] passage of the requisite examinations, and election as an Associate Member of [redacted] was equivalent to a four-year Bachelor of Science in Electronic Engineering from an accredited U.S. college or university;
- An educational evaluation from [redacted], dated April 1, 2015, likewise asserting that the Beneficiary's associate membership in the [redacted] after four years of coursework and examinations was equivalent to a four-year Bachelor of Science in Electronic Engineering from an accredited university in the United States;
- An "expert opinion letter" from [redacted] dated April 2, 2015, likewise asserting that the Beneficiary's four-year academic program at the [redacted] was equivalent to a four-year Bachelor of Science in Electronic Engineering from an accredited university in the United States; and

- An excerpt from the American Association of College Registrars and Administrative Officers (AACRAO)'s Electronic Database for Global Education (EDGE) stating that associate membership in the [redacted] represents a level of education comparable to a bachelor's degree in the United States.

On May 21, 2015, the Director denied the petition. The Director found that the [redacted] is not an accredited college or university and associate membership in the [redacted] is not a baccalaureate degree. Therefore, the Beneficiary's credential from the [redacted] was not a foreign equivalent degree to a U.S. bachelor's degree. As such, it did not qualify him for classification as an advanced degree professional under section 203(b)(2) of the Act, and did not qualify him for the job offered under the terms of the labor certification.

The Petitioner filed an appeal, accompanied by a brief from counsel and copies of documentation already in the record. We conduct appellate review on a *de novo* basis. *See Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

The only issues on appeal are whether the Beneficiary's credentials are sufficient to satisfy the educational requirements of the advanced degree professional classification and the educational requirements of the job offered as set forth on the labor certification.

I. CLASSIFICATION AS AN ADVANCED DEGREE PROFESSIONAL

At this point, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS.[2] The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[3] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference [visa category] status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the*

[2] INS – the legacy Immigration and Naturalization Service – was replaced in part by USCIS as a result of the Homeland Security Act of 2002, effective March 1, 2003.

[3] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> *certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> [T]he Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the Beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the Beneficiary qualifies for the offered position, and whether the offered position and the Beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the Petitioner requests classification of the Beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.[4] The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If

[4] Section 203(b)(2) of the Act also provides immigrant classification to aliens of exceptional ability. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

> a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the INS responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus five years of progressive experience in the specialty). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[5] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus five years of progressive experience in the specialty). *See* 8 C.F.R. § 204.5(k)(2).

The degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study."

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[5] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *See Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *per APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991).[6]

The documentation of record shows that the Beneficiary has not received any educational credential from a college or university, and his highest credential – associate membership in India's [redacted] – is not a foreign degree equivalent to a U.S. bachelor's degree.

In the appeal brief, counsel claims that the Director did not properly examine supporting documents submitted by the Petitioner, in particular the educational credentials evaluation of [redacted] and the "expert opinion letter" of [redacted]

According to [redacted] the Beneficiary's coursework at the [redacted] was comparable to the curricula of U.S. four-year bachelor's degree programs in electronic engineering. Wolk cites the "credential advice" in AACRAO's database – the Educational Database for Global Education (EDGE) – which states that associate membership in the [redacted] "represents attainment of a level of education comparable to a bachelor's degree in the United States." [7] Wolk also cites the U.S. Department of

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[6] *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

[7] According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php. Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.
In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the beneficiary's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the beneficiary's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the

Education's Office of Research which classifies membership in the as representing four years of post-secondary studies, making it comparable to a bachelor's level academic degree. Quoting the Merriam-Webster Dictionary's definition of "college" as "an institution offering instruction usually in a professional, vocational, or technical field," and its definition of "degree" as "a title conferred on students by a college, university, or professional school on completion of a program of study," Wolk claims that the beneficiary's certificate of associate membership from the is akin to an academic degree from a college. As further evidence of its bachelor's level equivalence, indicates that an Associate Member of is eligible for admission to master's degree programs at and other U.S. universities,

Like asserts that the Beneficiary's program at the was comparable to a four-year bachelor's degree programs in electronic engineering in the United States. Both the admissions requirements and the curricula of the according to are comparable to four-year bachelor of engineering programs at Indian and U.S. universities. Moreover, the Beneficiary had the equivalent of one year of university-level studies prior to his studies, according to by virtue of completing a three-year post-secondary diploma program in digital electronics in 1989.

For the purposes of this immigrant petition, the evaluations of are not persuasive. While associate membership in the may be regarded as comparable to a U.S. bachelor's degree for certain purposes, like admission to graduate schools or job applications, it is not a foreign equivalent degree to a U.S. bachelor's degree for the purpose of visa classification as an "advanced degree professional" under the Act because the credential is not a degree from a college or university. As previously indicated, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States *baccalaureate degree or a foreign equivalent degree*." (Emphasis added.) The Beneficiary's certificate from the showing that he is an Associate Member of the Institute does not meet the regulatory requirement because it is not a college or university degree.

Thus, the Petitioner has not established that the Beneficiary has a foreign equivalent degree to a U.S. bachelor's degree. Accordingly, the beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act. Therefore, the petition cannot be approved.

II. BENEFICIARY QUALIFICATIONS

As previously indicated, to be eligible for approval as an advanced degree professional the Beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job

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combination of education and experience.

requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found in Part H of the ETA Form 9089. This section of the labor certification application describes the minimum education, training, and experience required for the job offered. In this case, the labor certification states that the offered position of project manager requires a U.S. bachelor's degree in engineering, or information technology, or computer information systems, or computer technology, or management information systems, or business administration, or a foreign educational equivalent (Part H, lines 4, 4-B, 7, 7-A, and 9). The labor certification specifically states that an alternate combination of education or experience is not acceptable (Part H, line 8).

The Beneficiary does not have a U.S. bachelor's degree or an equivalent foreign degree in one of the fields identified in the labor certification. Instead, he has an associate membership certificate from a professional association that, while educationally comparable to a U.S. bachelor's degree, is not itself a degree from a foreign college or university. Since he does not have a degree from a college or university, the Beneficiary does not satisfy the minimum educational requirement of the labor certification to qualify for the job offered. For this reason as well, the petition cannot be approved.

III. CONCLUSION

We affirm the director's determination that the Beneficiary does not possess a U.S. bachelor's degree or a foreign equivalent degree, as required to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act and to qualify for the job offered under the terms of the labor certification. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the Petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of H-A-, Inc.*, ID# 15047 (AAO Dec. 7, 2015)